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KW AQUATIC SUPPLIES SDN BHD v. MERP TECHNOLOGIES SDN BHD

HIGH COURT MALAYA, PULAU PINANG
AHMAD SHAHRIR MOHD SALLEH JC
[CIVIL APPEAL NO: PA-12ANCC-12-04-2017]
B 7 SEPTEMBER 2017

CIVIL PROCEDURE: *Transfer of proceedings – From one Sessions Court to another – Appeal against Sessions Court's decision to transfer proceedings from Sessions Court Georgetown to Sessions Court Shah Alam – Place where cause of* C *action arose – Test of 'closest nexus to the dispute' – Whether Sessions Court Georgetown proper forum – Rules of Court 2012, O. 57 r. 1(4)*

The plaintiff agreed to purchase and the defendant agreed to sell a planning system ('system') at a purchase price of RM140,000. According to the agreed terms, the purchase price included the provision of training by the defendant D for the plaintiff's employees at the plaintiff's premises in Penang. According to the plaintiff, the terms of the agreement between the parties were partly oral, partly written and partly through conduct of the parties. Subsequently, the plaintiff alleged that the defendant was in breach of the representations it made to the plaintiff when the system failed to fulfil the operational E requirements of the plaintiff. The plaintiff commenced an action against the defendant at the Sessions Court Georgetown. The defendant made an application to stay and transfer the proceedings to the Sessions Court Shah Alam on the grounds that (i) the defendant had a business address in the State of Selangor; (ii) that the material witness for the defendant resided in Subang F Jaya, Selangor; and (iii) the plaintiff had not expressly specifically pleaded in its statement of claim any information relating to the time and place where the misrepresentations were allegedly made. The Sessions Court Judge decided to allow the defendant's application for the proceedings to be stayed and transferred to the Sessions Court Shah Alam. Dissatisfied, the plaintiff G appealed.

Held (allowing appeal):

(1) The plaintiff had satisfied one of the conditions provided under paras. (A) to (E) of O. 57 r. 1(4)(d) of the Rules of Court 2012 to have H the action remain in the Sessions Court Georgetown on the basis of the place where the cause of action had arisen. The test of 'closest nexus to the dispute' is fact-dependent. It was not disputed that the system was installed at the plaintiff's premises in Penang. The maintenance and support services for the system which were rendered by the defendant also took place at the plaintiff's premises, either in Prai or at Ayer I Hitam, Georgetown. Likewise, on-site services were also carried out at the plaintiff's premises, either in Prai or at Ayer Hitam, Georgetown. The sole factor which tilted in favour of the defendant was only the fact that the defendant's place of business was at Shah Alam, Selangor. (paras 33-35)

(2) If the cause of action arose in Prai, Pulau Pinang, the plaintiff may commence the action either at the Sessions Court Butterworth or the Sessions Court Georgetown. In the interest of justice, this was not a fit and proper case to be transferred to the Sessions Court Shah Alam. The Sessions Court Georgetown was the proper forum upon consideration of the facts of the case. Upon evaluation of the facts, the closest nexus to the dispute was Penang and not Selangor. Thus, the decision of the Sessions Court Judge was set aside. (paras 39-41)

Case(s) referred to:

Amalan Lengkap Sdn Bhd v. SKS Coachbuilders Sdn Bhd [2016] 1 LNS 883 HC ***(refd)***
American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***
Bank Bumiputra Malaysia Bhd v. Melewar Holdings Sdn Bhd & Ors [1990] 1 CLJ 1246; [1990] 1 CLJ (Rep) 654 HC ***(refd)***
Bunga Lawas Shipping Agencies Sdn Bhd v. Nusantara Worldwide Insurance (Malaysia) Bhd & Ors [1999] 2 CLJ 731 HC ***(refd)***
Diamond v. Bank of London and Montreal Ltd [1979] 1 All ER 561 ***(refd)***
Goodness for Import and Export v. Phillip Morris Brands SARL [2016] 7 CLJ 303 FC ***(refd)***
Jalaludin Sulaiman v. MCIS Zurich Insurance Bhd [2007] 1 LNS 101 HC ***(refd)***
Lim Guan Eng v. FZ Sdn Bhd & Anor [2014] 1 LNS 1599 HC ***(refd)***
Loke Wan Tho v. Lachie Mcdonald & Ors [1949] 1 LNS 119 ***(refd)***
Low Long Yoong & Anor v. Low Kok Choon & Anor [2014] 4 CLJ 577 HC ***(refd)***
Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 HC ***(refd)***
Q2 Engineering Sdn Bhd v. PJI - LFGC (Vietnam) Ltd & Ors [2012] 8 CLJ 1005 HC ***(refd)***
Raja Thangiah v. Baldev Singh Bhar [2001] 7 CLJ 130 HC ***(refd)***
Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor [1997] 1 CLJ 775 HC ***(refd)***
Sogelease Advance (Malaysia) Sdn Bhd v. Kemajuan Tat Young Sdn Bhd & Ors [1999] 5 CLJ 331 HC ***(refd)***
Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1987] 1 LNS 55 HC ***(refd)***
Spiliada Maritime Corp v. Cansulex Ltd [1986] 3 All ER 843 ***(refd)***
Tan Hoo Eng & Ors v. Lim Keck Eng & Ors [2014] 9 CLJ 992 HC ***(refd)***
Vincent Danial lwn. Rani M Doraisamy [2009] 1 LNS 961 HC ***(refd)***
Yee Teck Fah (T/A Yee Teck Fah & Co) v. Lim Soo Chooi [2012] 6 CLJ 901 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 57 rr. 1(4)(d)(A), (B), (C), (D), (E)
Subordinate Courts Act 1948, s. 59(1), Third Schedule ss. 2, 3

For the appellant - Tay Hong Jin; M/s Halim Hong & Quek
For the respondent - Lee Guan Tong; M/s SS Ng & Lim

[Editor's note: Appeal from Sessions Court Georgetown; Summons No: PA-B52NCC-57-11-2016.]

Reported by Suhainah Wahiduddin

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JUDGMENT
(encl. 1)

Ahmad Shahrir Mohd Salleh JC:

Introduction

B **[1]** This is an appeal by the plaintiff against the decision of the learned Sessions Court Judge on 6 April 2017 in allowing the defendant's application to stay and transfer the proceedings to the Sessions Court Shah Alam. The parties in the present appeal will be referred to as they were at the Sessions Court.

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Background Facts

[2] The plaintiff agreed to purchase and the defendant agreed to sell a planning system ("system") at a purchase price of RM140,000. According to the agreed terms, the purchase price includes the provision of training by the D defendant for the employees of the plaintiff at the plaintiff's premises in Penang. There was no formal written agreement.

[3] According to the plaintiff, the terms of the agreement between the parties are partly oral, partly written and partly through conduct of the parties. The plaintiff also alleges that the defendant had, through its E representatives, made express and unconditional representations that the system would be able to fulfil all purposes and operational requirements of the plaintiff.

[4] Pursuant to the agreed terms, the plaintiff had made payments to the defendant in the sum of RM107,940 made up as follows:

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(a) RM56,000 on 14 August 2014 as the first part payment;

(b) RM29,680 on 23 September 2015 as the second part payment; and

(c) RM22,260 on 30 December 2015 made under protest for annual maintenance and support fee. This payment was made under protest G because according to the plaintiff, the system failed to fulfil the operational requirements of the plaintiff.

[5] The plaintiff alleges that the defendant is in breach of the representations it made to plaintiff when the system failed to fulfil the operational requirements of the plaintiff. H

[6] The plaintiff then commenced an action against the defendant at the Sessions Court Georgetown. The defendant had not filed its defence but made an application dated 9 December 2016 to stay and transfer the proceedings to the Sessions Court Shah Alam on the following grounds:

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(a) that the defendant has a business address in the State of Selangor;

(b) that the material witnesses for the defendant reside at Subang Jaya, Selangor; and

(c) that although the plaintiff's pleaded cause of action is based on misrepresentation, the plaintiff had not expressly or specifically pleaded in its statement of claim any information relating to the time and place whereby the purported misrepresentations were allegedly made.

[7] Affidavits for and against the application were filed by the parties respectively. On 6 April 2017 after considering the application and submissions of parties, the learned Sessions Court Judge decided to allow the defendant's application for the proceedings to be stayed and transferred to the Sessions Court Shah Alam. The plaintiff is not satisfied with the decision of the learned Sessions Court Judge and appeals to this court.

Contention Of Parties

The Plaintiff's Contention

[8] At the outset, the plaintiff contends that for the purpose of determining whether the court has the jurisdiction to hear a matter, the statements made by the plaintiff in the statement of claim must be assumed to be true. The plaintiff relies on the authority of *Goodness for Import and Export v. Phillip Morris Brands SARL* [2016] 7 CLJ 303; [2016] 5 MLJ 171 for this proposition. The plaintiff argues that each branch of the court located in any State has the concurrent jurisdiction to entertain any civil proceedings regardless of the fact that the cause of action had arisen in another State. The plaintiff submits that the Georgetown Sessions Court has jurisdiction to hear the proceedings. (See: *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22; [1999] 6 MLJ 112, *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55; [1988] 2 MLJ 268 and *Sogelease Advance (Malaysia) Sdn Bhd v. Kemajuan Tat Young Sdn Bhd & Ors* [1999] 5 CLJ 331; [1999] 1 AMR 652). The plaintiff contends that the respondent does not dispute the fact that the Georgetown Sessions Court has the jurisdiction to entertain the proceedings but the defendant alleges that the Georgetown Sessions Court is not the *forum conveniens*.

[9] The plaintiff submits that the place where the cause of action arose is the overriding factor in determining which is the most appropriate and suitable court to hear a suit. The plaintiff relies on the authority of *Bank Bumiputra Malaysia Berhad v. Melewar Holdings Sdn Bhd & Ors* [1990] 1 CLJ 1246; [1990] 1 CLJ (Rep) 654 which provides clear guidelines as to the priorities that ought to be given to the various factors in resolving the matter at p. 1247 as follows:

> The question for the Court to decide is where did the cause of action arise, in Kuala Pilah or in Kuala Lumpur. This is the first question to determine the local jurisdiction, failing which the court has to look into the next alternative i.e. where the defendants or one of the several defendants resided or has his place of business, then on to the next sub-sections (c) and (d) of s. 23(1) of the Courts of Judicature Act, 1964.

(See also: *Malacca Securities Sdn Bhd v. Loke Yu* (*supra*), *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* (*supra*), *Yee Teck Fah (T/A Yee Teck Fah & Co) v. Lim Soo Chooi* [2012] 6 CLJ 901; [2011] 9 MLJ 305, and *Amalan Lengkap Sdn Bhd v. SKS Coachbuilders Sdn Bhd* [2016] 1 LNS 883; [2016] MLJU 513 which had also given priority to the factor of where the cause of action arose in determining which is the most appropriate and suitable court to hear a suit.)

[10] It is the plaintiff's contention that the defendant had acted in breach of the terms of the agreement in Penang. The system was supplied to and installed at the plaintiff's premises in Penang. Subsequently, the system had failed to fulfil the operational requirements of the plaintiff. That being the case, the plaintiff argues that the cause of action for breach of contract had accrued in Penang. On the issue as to where the cause of action had arisen in a breach of contract case, the plaintiff again relies on the authority of *Malacca Securities* (*supra*) which held *inter alia* as follows:

> ... With regard to accrual of a cause of action in contract cases it is deemed to have occurred at the place where the breach took place.

(See also: *Bunga Lawas Shipping Agencies Sdn Bhd v. Nusantara Worldwide Insurance (Malaysia) Bhd & Ors* [1999] 2 CLJ 731).

[11] In *Malacca Securities* (*supra*) too, the court observed at p. 39 (CLJ); p. 126 (MLJ) that:

> ... The principal contention of the defendant is that this action should be tried in the High Court in Malaya at Kuala Lumpur in accordance with s. 23(1) of the Courts of Judicature Act 1964 as he resides there. It thus becomes necessary to consider the legal effect of the section. It has four sub-paragraphs. The comma appearing at the end of sub-para (a), (b), (c) and (d) in the section followed by the word 'or' means that they must be construed disjunctively. Thus a party instituting a proceeding in a particular branch of the High Court may do so if his case falls within any one of the sub-paragraphs. This was the basis on which Abdul Hamid J. (as he then was) determined the jurisdiction of the court in *Lam Kok Trading Co (Pte) Ltd & Anor v. Yorkshire Switchgear & Engineering Co Ltd* [1979] 1 MLJ 239.

And further at p. 40 (CLJ); pp. 127 & 128 (MLJ):

> ... The plaintiff's cause of action therefore arose in Melaka. The plaintiff's case also comes within sub-para (c) as the facts on which the action is based occurred in Melaka ... As the plaintiff has brought itself within s. 23(1)(a) and (c) of the CJA it is entitled to file this action in Melaka notwithstanding the fact that the defendant resides in Kuala Lumpur. The defendant's application is therefore without any merit.

[12] In respect of the place where the cause of action has arisen in a case of the alleged misrepresentation, the plaintiff contends that the cause of action in respect of the alleged misrepresentation had accrued in Penang as

the false representations made by the defendant's representatives to the plaintiff's representatives had taken place in Penang or had been committed at the place where the telephone calls or emails had been received and acted upon, namely in Penang. The plaintiff contends that the defendant's representatives had made the false verbal representations (that the system would purportedly be able to fulfil the operational requirements of the plaintiff), amongst others, in meetings with the plaintiff's representatives at the plaintiff's premises at No. 2603, MK1, Lorong Perusahaan 8, 13600 Prai, Penang. Likewise, the plaintiff's operations manager, Mr Anthony Tan, had received the false representations made by the defendant's representatives *vide* telephone calls and emails in Penang. The plaintiff relies on the authority of *Jalaludin Sulaiman v. MCIS Zurich Insurance Berhad* [2007] 1 LNS 101; [2007] MLJU 239 where it was observed that:

> In the first place, it seems clear to me that the plaintiff's cause of action arose in Johore Bahru for the reason that the alleged representation made to the plaintiff by the defendant's agent occurred in Johor Bahru ...

[13] And the then Supreme Court in *American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273; [1995] 1 MLJ 160 referring to *Diamond v. Bank of London and Montreal Ltd* [1979] 1 All ER 561 and remarked that:

> The learned judge relied on, *inter alia*, the case of *Diamond v. Bank of London and Montreal Ltd* [1979] QB 333; [1979] 1 All ER 561; [1979]2 WLR 228 ... in that case, it was held that the tort of fraudulent and negligent misrepresentation when made by the telephone or telex was committed at the place where the message was received and acted on, and not the place from which it was sent ...

[14] The plaintiff argues that the facts upon which the proceedings are based upon had occurred in Penang. The agreement consists of terms which are partly oral and partly by conduct.

[15] As far as the oral terms are concerned, the following events are pertinent:

(i) meetings were held on or around 22 July 2014 and 20 August 2014 at the plaintiff's premises at No. 2603, MK1, Lorong Perusahaan 8, 13600 Prai, Penang between the plaintiff's representatives and the defendant's representatives;

(ii) in those meetings, the plaintiff's representatives indicated to the defendant's representatives of the plaintiff's requirements insofar as the system is concerned. The defendant's representatives then proceeded to demonstrate the system to the plaintiff's representatives at the plaintiff's premises in Penang;

(iii) the plaintiff's operations manager, Mr Anthony Tan who is based in Penang, had communicated with the defendant's representatives *via* telephone and emails during which the defendant's representatives had promised the plaintiff's operations manager that the system would be able to fulfil the operational requirements of the plaintiff;

(iv) as promised by the defendant's representatives during the meetings in Penang, the defendant did station its representative in Penang to provide training and technical support, assistance and advice to the plaintiff, *albeit* only up to about February 2015.

[16] The plaintiff contends that in relation to the agreed terms by way of conduct of the parties, the following conducts are relevant:

(i) the defendant had installed the system at the plaintiff's premises in Penang; and

(ii) the defendant provided training and technical support, assistance and advice to the plaintiff's employees at the plaintiff's premises in Penang.

[17] Insofar as the written terms of the agreement are concerned, the plaintiff alleges that the terms are contained in or could be implied from, amongst others, the quotations issued by the defendant, the purchase orders issued by the plaintiff, and the emails exchanged between both parties. Since the system was installed at the plaintiff's premises in Penang, the plaintiff's officers and employees, including its director, Ms Chua Ming Hong and in particular its operations manager, Mr Anthony Tan, would from time to time raise issues and complaints relating to the system to the defendant from the plaintiff's premises in Penang as well as to the defendant's representative who was based in Penang.

[18] The plaintiff submits that all the facts, transactions and events on which the proceedings are based had transpired in Penang and that this is consistent with O. 57 r. 1(4) of the Rules of Court 2012 which enumerates the factors to be considered in an application to transfer an action from one court to another.

[19] The plaintiff argues that the defendant only relies on two main grounds in support of his application, namely:

(i) that the defendant has its business address in Selangor; and

(ii) that the defendant's witnesses live in Subang Jaya, Selangor.

These grounds, according to the plaintiff, are not the conclusive factors to be considered let alone the most important factor, in deciding whether to transfer a particular proceeding. Further, the residence of a defendant's witness is not a factor provided under O. 57 r. 1(4) of the RC 2012 as the plaintiff could also, in the same vein, argue that the plaintiff's places of business are located in Penang as evidenced in the "afidavit balasan pertama plaintif" affirmed on 3 January 2017 by Chua Ming Hong.

[20] The plaintiff refers to the case of *Lim Guan Eng v. FZ Sdn Bhd & Anor* [2014] 1 LNS 1599; [2015] 8 MLJ 469 where the facts are similar to the present proceedings with respect to the address of the defendant. In that case, the High Court in dismissing the defendant's application to transfer the action, held that:

> [33] In the present case, the fact that the first defendant is situated in Petaling Jaya and the second defendant resides in Cyberjaya are not sufficient ground to transfer this case to Shah Alam High Court. There are other factors, as mentioned earlier that were considered by this court which then of the view that the proper forum for this case is Penang High Court.

[21] The plaintiff maintains that based on its cause of action in respect of breach of contract and misrepresentation, and the facts upon which the proceedings are based existed or were alleged to have taken place in Penang. Thus, it is crucial for the relevant witnesses for the plaintiff, including its director, Ms Chua Ming Hong, its operations manager, Mr Anthony Tan, and its officers and employees who had used and encountered problems in using the system all of whom reside in Penang, to testify in court to prove the plaintiff's case. The plaintiff contends that in this regard, the sole factor relied upon by the defendant to support its application, that the defendant's business address and the residence of its two witnesses being in Selangor are nullified by the plaintiff's business addresses and the residence of the plaintiff's witnesses who outnumbered that of the defendant's.

[22] The plaintiff also argues that there are no valid grounds for the defendant to apply for a stay of proceedings. It is the plaintiff's submissions:

(i) that it is indisputable that the Georgetown Sessions Court has the jurisdiction to hear this action;

(ii) that the Georgetown Sessions Court has the most real and substantial connection with the action because the cause of action and the facts upon which the proceedings are based existed or were alleged to have occurred in Penang;

(iii) that the defendant has failed to substantiate its allegation that the Shah Alam Sessions Court is the more appropriate forum to adjudicate this action; and

(iv) that it would be unjust to confine the plaintiff to remedies elsewhere, namely, at the Shah Alam Sessions Court.

[23] The plaintiff relies on the case of *Malacca Securities (supra)* whereby the court referred to the case of *Loke Wan Tho v. Lachie Mcdonald & Ors* [1949] 1 LNS 119; [1949] MLJ 293 and held that:

> … where a person is properly served within the jurisdiction for a matter over which the court has jurisdiction, a stay can be granted only on very strong grounds.

[24] The plaintiff also cites the decision of the then Supreme Court in *American Express Bank Ltd (supra)* whereby the Supreme Court observed at p. 281 (CLJ); pp. 167 and 168 (MLJ) as follows:

> In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine (of *forum non conveniens*), the defendant would have to satisfy the court that 'some other forum is more appropriate' per Lord Templeman in *The Spiliada* ...
>
> ... we are of the considered view that in all cases of either a defendant's application for stay of proceedings … it will be obligatory for a Malaysian court to consider in any event, a most important factor, i.e. whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysian court considers all cases in connection with *forum non conveniens*.
>
> The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection.

(See also: *Spiliada Maritime Corp v. Cansulex Ltd* [1986] 3 All ER 843 and *Q2 Engineering Sdn Bhd v. PJI - LFGC (Vietnam) Ltd & Ors* [2012] 8 CLJ 1005; [2012] MLJU 583).

The Defendant's Contention

[25] The defendant on the other hand contends:

(i) that the defendant's business address is at Shah Alam, Selangor;

(ii) that the defendant's material witnesses, Wong Chew Ting and Tay Swee Eng, both stay in Selangor;

(iii) that one of the causes of action is based on misrepresentation but in the statement of claim, the plaintiff never provided where and when the alleged misrepresentation took place; and

(iv) that on 28 November 2016, the defendant had instructed its solicitors to write to the plaintiff's solicitors to inquire if the plaintiff is agreeable to have the matter transferred to the Shah Alam or Kuala Lumpur Sessions Court or to withdraw the matter and re-file it at the appropriate forum but the plaintiff's solicitors objected to the proposal.

[26] The defendant relies on O. 57 r. 1 of the Rules of Court 2012 and s. 3 of the Third Schedule of the Subordinate Courts Act 1948 and pray that the case shall be transferred to the Shah Alam Sessions Court under O. 57 r. 1(4)(B) of the Rules of Court 2012 on the grounds that the defendant's business address is at Shah Alam, Selangor and under O. 57 r. 1(4)(E) of the Rules of Court 2012 because as the witnesses residential address is also at Shah Alam, Selangor. These provisions are read together with s. 2 of the Third Schedule of the Subordinate Courts Act 1948 in respect of transfer and stay.

[27] Sections 2 and 3 of the Third Schedule of the Subordinate Courts Act 1948 read as follows:

THIRD SCHEDULE

[Section 99A]

ADDITIONAL POWERS OF SESSIONS COURTS AND MAGISTRATES COURTS

Stay of proceedings

2. (1) Power to stay proceedings unless they have been instituted in the District in which:

(a) the cause of action arose;

(b) the defendant resides or has his place of business;

(c) one of several defendants resides or has his place of business;

(d) the facts on which the proceedings are based exist or are alleged to have occurred; or

(e) for other reasons it is desirable in the interests of justice that the proceedings should be had.

(2) (Omitted).

Transfer of proceedings

3. (1) (Deleted by Act 7 of 1964).

(2) Power, on application or of its own motion, to transfer any proceedings to another court of co-ordinate jurisdiction.

[28] The defendant further rely on the authority of *Vincent Danial lwn. Rani M Doraisamy* [2009] 1 LNS 961; [2010] 7 MLJ 116 whereby the High Court held:

> .. Mahkamah ini berpuashati bahawa adalah lebih sesuai dan lebih adil bicara dijalankan di Kuala Lumpur, di mana defendan hanya perlu menunjukkan satu alasan sahaja daripada empat alasan yang ditetapkan di bawah Jadual Ketiga Akta Mahkamah-Mahkamah Rendah 1948, iaitu, di mana tindakan harus difailkan, tetapi defendan telah menunjukkan lebih daripada satu alasan supaya kes patut difailkan dan seterusnya dibicarakan di Kuala Lumpur.

[29] The defendant then brings this court's attention to para. 8 of the statement of claim which appears at p. 9 of the record of appeal. It states that the oral agreement was entered into in "Prai, Pulau Pinang" but not Georgetown. The defendant also dismisses the plaintiff's lengthy argument of where the cause of action arose as frivolous.

Evaluation And Decision

[30] In an application for a transfer of proceedings, the burden is cast upon the applicant to satisfy the court that the proceedings ought to be so transferred on grounds of convenience, appropriateness and fair trial. (See: *Raja Thangiah v. Baldev Singh Bhar* [2001] 7 CLJ 130 HC and *Tan Hoo Eng & Ors v. Lim Keck Eng & Ors* [2014] 9 CLJ 992 HC).

[31] The action in the present appeal is one that is within the jurisdiction of the Sessions Court. This in effect is an application made under O. 57 r. 1(4)(d) of the Rules of Court 2012 and the defendant as the applicant in the present appeal must satisfy any one of the conditions provided under paras. (A) to (E) of O. 57 r. 1(4)(d) of the Rules of Court 2012. Order 57 r. 1 of the Rules of Court 2012 reads:

> Transfer of proceedings to another Court (O. 57 r. 1)
>
> 1. (1) Where the Judge of the High Court or a Judge of the Sessions Court or a Magistrate is satisfied that any proceedings in that Court can be more conveniently or fairly tried in some other Court of co-ordinate jurisdiction, he may on application by any party, order the proceedings to be transferred to the other Court.
>
> (2) A transfer of any proceedings from:
>
> (a) a Subordinate Court to the High Court; or
>
> (b) the High Court to a Subordinate Court,
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> shall only be made by an order of that High Court Judge on application by any party by originating summons or notice of application, whichever is appropriate.
>
> (3) A transfer of any proceedings from:
>
> (a) a Magistrates' Court to a Sessions Court; or
>
> (b) a Sessions Court to a Magistrates' Court,
>
> shall only be made by an order of that Sessions Court Judge on application by any party by originating summons or notice of application, whichever is appropriate.
>
> (4) Before making any order to transfer any proceedings from:
>
> (a) the High Court to another High Court of co-ordinate jurisdiction;
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> (b) a Subordinate Court to the High Court;
>
> (c) the High Court to a Subordinate Court; or
>
> (d) a Subordinate Court to another Subordinate Court,
>
> the High Court Judge or the Judge of the Sessions Court or Magistrate, as the case may be, shall take into consideration whether the High Court or Subordinate Court which shall hear the case is located at or nearest to the place where:
>
> (A) the cause of action arose;

(B) the defendant, or one of the several defendants, resides or has his place of business;

(C) the facts on which the proceedings are based exist or are alleged to have occurred;

(D) the land the ownership of which is disputed is situated; or

(E) for other reasons it is desirable in the interests of justice that the proceedings should be transferred.

(5) In this Order, "Subordinate Court" means the Magistrates' Court or the Sessions Court.

[32] Reading the relevant provisions of the Rules of Court 2012, I hold the view that the conditions under paras. (A) to (E) of O. 57 r. 1(4)(d) of the Rules of Court 2012 are disjunctive in nature due to the use of semi-colons between the paragraphs and the use of the word "or" at the end of para. (D). (See: *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor* [1997] 1 CLJ 775; [1996] MLJU 510; HC and *Malacca Securities (supra)*). It is thus sufficient for the purposes of an application to transfer proceedings if the defendant can fulfil any one of the conditions stipulated under paras. (A) to (E) of O. 57 r. 1(4)(d) of the Rules of Court 2012.

[33] The plaintiff contends that the proceedings at the Sessions Court Georgetown should not be transferred to the Sessions Court Shah Alam because the cause of action arose in Penang and that the prospective witnesses for the plaintiff fairly outnumbered the prospective witnesses for the defendant. And in that circumstance, it is more appropriate for the action to be tried in the Sessions Court Georgetown and not in the Sessions Court Shah Alam. Although I agree that based on the facts of the case, the cause of action arose in Penang, with respect, I am unable to agree with the plaintiff's contention that the place of residence of the prospective witnesses for the plaintiff or the fact that the plaintiff has many more witnesses who reside in Penang compared to that of the defendant who reside in Selangor, is a factor to be considered within the parameters of paras. (A) to (E) of O. 57 r. 1(4)(d) of the Rules of Court 2012. In fact, the defendant, by asserting that it has a business address in Shah Alam, Selangor has satisfied one of the conditions to have the action transferred to the Sessions Court Shah Alam.

[34] On the same breadth, this court should not also turn a blind eye of the fact that the plaintiff too has satisfied one of the conditions to have the action to remain in the Sessions Court Georgetown on the basis of the place where the cause of action has arisen. On the face of equally acceptable grounds for a transfer of the proceedings to be made to the Sessions Court Shah Alam and for the proceedings to remain in the Sessions Court Penang, this court in the interest of justice, has to delve further into the facts and attempt to sieve some

A determinant factors to assist it in coming to a decision. In the case of *Low Long Yoong & Anor. v. Low Kok Choon & Anor* [2014] 4 CLJ 577; [2014] 2 MLJ 725 HC, His Lordship Nantha Balan JC (now HCJ) was of the view that the most important task is to ascertain which court had the closest nexus to the dispute. In the circumstances of this case, I would readily subscribe B to this view.

[35] The test of "closest nexus to the dispute" is fact-dependent. In the present case, it is not disputed that the system was installed at the plaintiff's premises in Penang. The maintenance and support services for the system which were rendered by the defendant also took place at the plaintiff's C premises, either in Prai or at Ayer Hitam, Georgetown. Likewise, on-site services were also carried out at the plaintiff's premises, either in Prai or at Ayer Hitam, Georgetown. The sole factor which tilts in favour of the defendant in this application is only the fact that the defendant's place of business is at Shah Alam, Selangor.

D **[36]** The defendant in his submissions pointed out that the plaintiff in his statement of claim pleads that the oral agreement was entered into in "Prai, Pulau Pinang" but not in Georgetown. In that situation, if this court is minded to allow the appeal, could the action remain in the Sessions Court Georgetown or should it be filed at the Sessions Court Butterworth in the first E instance since Prai is within the territory of Butterworth?

[37] The territorial jurisdiction of the Sessions Court is governed under s. 59 of the Subordinate Courts Act 1948. It reads:

> Constitution and territorial jurisdiction of Sessions Courts
>
> F 59. (1) The Yang di-Pertuan Agong may, by order, constitute so many Sessions Courts as he may think fit and shall have power, if he thinks fit, to assign local limits of jurisdiction thereto.
>
> (2) Subject to this Act or any other written law, a Sessions Court shall have jurisdiction to hear and determine any civil or criminal cause or G matter arising within the local limits of jurisdiction assigned to it under this section, or, if no such local limits have been assigned, arising in any part of Peninsular Malaysia.
>
> (3) Each Sessions Court shall be presided over by a Sessions Court Judge appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Judge.
>
> H
>
> (4) Sessions Courts shall ordinarily be held at such places as the Chief Judge may direct, but should necessity arise they may also be held at any other place within the limits of their jurisdiction.

I

[38] In the case of *Yee Teck Fah (T/A Yee Teck Fah & Co) v. Lim Soo Chooi* [2012] 6 CLJ 901; [2011] 9 MLJ 305 HC, Her Ladyship Suraya Othman J (as Her Ladyship then was), in relation to s. 59(1) of the Subordinate Courts Act 1948 held:

> In deciding what is the territorial jurisdiction of the sessions courts, I am in agreement with the decision of *Public Prosecutor v. Segaran a/l S Mathavan* that under s. 59(1), only the Yang di-Pertuan Agong has the power to assign local limits of jurisdiction to the sessions courts. And since His Royal Highness has not made any such order under the said section, which order has to be gazetted, to assign the local limits of jurisdiction of each sessions court, then, s. 59(2) comes into play; that is, if no such local limits have been assigned to the sessions courts, then the sessions courts have jurisdiction to hear and determine any cause or matter arising in any part of the local jurisdiction of the respective High Court. This mean that the sessions courts have the same local jurisdiction as the High Courts as defined under s 3 of the CJA 1964; that is the sessions courts in Malaya have jurisdiction which covers all states in Peninsular Malaysia or West Malaysia and the sessions courts in Sabah and Sarawak have jurisdiction which covers both the states of Sabah and Sarawak or East Malaysia.".

[39] Based on the case of *Yee Teck Fah (T/A Yee Teck Fah & Co) (supra)*, it is thus clear that if the cause of action arose in Prai, Pulau Pinang, the plaintiff may commence the action either at the Sessions Court Butterworth or the Sessions Court Georgetown.

[40] Upon considering the record of appeal and the arguments of learned counsels, I am of the view that in the interest of justice, this is not a fit and proper case to be transferred to the Sessions Court Shah Alam and that the Sessions Court Georgetown is the proper forum upon consideration of the facts of the case. Upon evaluation of the facts too, I am of the considered view that the closest nexus to the dispute in the present case is Penang and not Selangor. In the premise as aforesaid, I allow the appeal with RM3,000 cost to be costs in the cause of the main suit. Since the appeal is allowed, I shall not deal with the question of stay.

Conclusion

[41] The appeal is allowed and the decision of the learned Sessions Court Judge is set aside. The defendant is to file in its statement of defence and counter-claim (if any) within 14 days from the date of this decision.